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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
 )  
Review of Communications Regulations )  
Governing Attribution of Broadcast )  
Interests )

MM Docket No. 94-150

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**REPLY COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE**

The NBC Television Affiliates Association, the CBS Television Affiliates Association and the ABC Television Affiliates Association (together, the "Network Affiliated Station Alliance" or "NASA") hereby submit their reply comments in response to the Notice of Proposed Rule Making in the above-referenced docket.<sup>1/</sup> In this proceeding, the Commission should adopt rules that recognize the true extent of networks' ability to influence the operations of television stations, in particular through the acquisition of less-than-controlling ownership interests.

**I. Networks Exploit the Exceptions in the Current Attribution Rules.**

As Commissioner Ness has explained, when it comes to evaluating ownership interests, "the issue . . . is the ability to *influence*, not control."<sup>2/</sup> The attribution rules are intended to treat an entity as an owner whenever it has the ability to influence a licensee's behavior, not merely when an entity has control of licensee decisions. If only actual true control were the standard, many interests that are captured by the current rules would not be

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<sup>1/</sup> Review of Communications Regulations Governing Attribution of Broadcast Interests, *Notice of Proposed Rule Making*, MM Docket No. 94-150, rel. Jan. 12, 1995. NASA also has submitted comments in the Commission's television ownership rulemaking, which address certain issues also within the purview of this proceeding in this docket. See Comments of NASA, MM Dockets Nos. 91-221, 87-8, filed May 17, 1995.

<sup>2/</sup> BBC License Subsidiary L.P., *Memorandum Opinion and Order*, FCC 95-179, rel. Apr. 27, 1995, separate statement of Commissioner Ness at 1 ("BBC License Subsidiary").

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considered attributable. For instance, the Commission will attribute ownership to an entity with a ten percent stock interest, even though such an interest typically will not confer *de jure* control, because a ten percent ownership can result in significant influence over a licensee.

Because the ability to influence is the purpose behind the rule, the attribution rule must be crafted to capture all of the circumstances under which an interest confers meaningful influence over a licensee's operations. The current rule does not achieve this result. As described in NASA's earlier comments, since the beginning of 1994 the national television networks have been exploiting exceptions to the attribution rules to acquire significant interests in television stations without having to count those interests toward the number of stations they are allowed to own. As a result, three of the four major networks — ABC, CBS and Fox — have interests that, if they were counted under the attribution rules, would exceed the nationwide station cap, the nationwide coverage cap or both. NASA Comments at 10 and Exhibit 1. Fox has been particularly adept at taking advantage of these loopholes. Under the current FCC rules Fox officially owns eight stations that cover less than 20 percent of the country. However, when the interests that are excepted from the ownership rules are included in the calculation, Fox has coverage of more than 38 percent of the nation, or fifty percent more than the coverage cap now permits. *Id.*

The networks have been able to achieve influence over an impermissibly large number of stations by exploiting loopholes in the attribution rules. For example, the "single majority shareholder" exception has allowed networks to avoid the ownership caps by acquiring only "less-than-controlling" interests when they make their investments. Under this exception the networks can structure their interests as minority interests in corporations with

single majority shareholders, or in other ways that appear to limit the networks' ability to control the stations in which they invest. Nevertheless, the networks gain considerable influence when they acquire less-than-controlling interests. Most obviously, the networks invariably obtain long-term affiliation agreements as a *quid pro quo* for their investments. Less obviously, but equally importantly, the networks' investments create a web of fiduciary obligations between network and licensee that the network can use to influence licensee decisions, including programming decisions. *Id.* at 10-11.

In this context, the Commission must recognize that a less-than-controlling interest may confer considerable influence on its owner. In particular, when less-than-controlling interests are combined with other agreements between a network and a licensee, such as affiliation agreements, the network's ability to influence the licensee's programming decisions will increase substantially. As Commissioner Ness has recognized, when a network combines a minority ownership interest with other agreements and relationships, the network will have significant leverage to influence decisions of the licensee. In such circumstances "the whole is greater than the sum of its parts."<sup>3/</sup>

The ability of the networks to use these loopholes to acquire influence over more stations than the ownership rules otherwise would permit undermines the policy that supports the rules. It also has significant negative effects on the public interest in localism in television broadcasting. Consequently, the Commission should act to curb the networks' exploitation of less-than-controlling interests.

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<sup>3/</sup> BBC License Subsidiary, separate statement of Commissioner Ness at 2.

**II. Increased Network Influence Over Affiliates Is Detrimental to the Public Interest.**

The networks' exploitation of gaps in the attribution rules is worrisome in and of itself because it represents an effort to evade the intent of the Commission's Rules. At the same time, network efforts to increase the extent of their influence through the acquisition of less-than-controlling interests also have a direct, detrimental effect on localism, one of the Commission's most important policy goals.

The Commission's interest in localism dates back to the beginning of its regulatory authority. It has been expressed frequently and directly in the Commission's decisions concerning networks and ownership, including the Chain Broadcasting Report and the Commission's 1953 decision to permit expanded multiple ownership of broadcast stations.<sup>4/</sup>

Localism is important because it is the policy behind broadcasters' decisions to tailor their programming to their communities of license. Localism results in coverage of locally-significant events, such as charity telethons, local elections, local news and local high school and college sporting events. Localism also is expressed by licensee decisions not to carry network programming that they find to be unsuitable for their communities. *See* NASA Comments at 4 (discussing ABC affiliate decisions not to carry *NYPD Blue*).

Networks have little interest in localism because their interests are best served if affiliates carry local programming only during time slots the networks do not fill. Consequently, network-owned stations are highly unlikely to preempt network programming,

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<sup>4/</sup> The Amendment of Sections 3.35, 3.240 and 3.636 of the Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Station, *Report and Order*, 9 RR 1563, 1568 (1953).

regardless of the interests of the local community. For instance, none of the ABC-owned stations chose not to air *NYPD Blue*, while many independently-owned affiliates chose not to carry that show during its first year of production. Given the opportunity, it is likely that the networks would take every possible step to prevent affiliates from preempting network programming.

Network acquisition of less-than-controlling interests in an increasing number of stations allows the network to increase its power over all of its affiliates, even the ones in which it lacks any ownership interest. Specifically, these non-attributable interests give the networks two new ways to increase their power over affiliates and, thus, to limit the ability of affiliates to respond to local needs. First, stations in which the networks own less-than-controlling interests are unlikely to preempt network programming, with a resulting reduction in their response to local needs. Second, as networks increase their ownership interests in network-affiliated stations, the remaining independently-owned affiliates will have greatly reduced power to bargain with their networks and, consequently, less ability to preempt network programming in favor of programming that better meets local needs. See NASA Comments at 5-9. In both cases, localism, and the local communities of the stations will suffer, and the networks' national agendas will benefit.<sup>5/</sup> It is, therefore, no surprise that the economic study commissioned by the networks for the Commission's ownership proceeding concludes that increased network ownership of television stations "reduc[e]

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<sup>5/</sup> In the ownership proceeding, the networks cite a 1969 study to support a claim that owned and operated stations meet local needs. This study is irrelevant for two reasons: (1) It is 25 years old; and (2) Stations were required to air a certain amount of public interest programming in 1969 to meet the then-extant renewal standards, a requirement that provided ample incentive to air such programming and even to preempt network programming to do so.

transactions [sic] costs of obtaining clearances," because networks no longer would have to worry about programming being rejected or preempted by independent affiliates.<sup>6/</sup> This reduction in transaction costs would come at the cost of a significant reduction in the ability of television licensees to meet the needs of their communities.

**III. The Commission Should Adopt Attribution Rules that Account for the Actual Extent of Network Influence in the Operation of Television Stations.**

Given the level of influence conferred on the networks by their less-than-controlling interests in affiliated stations, it is evident that the Commission should take steps to curb the networks' continuing efforts to increase their influence while avoiding attribution. To do so, the Commission should attribute less-than-controlling interests in its determinations of whether the networks are in compliance with the national ownership limits.

The Commission can accomplish this goal by applying the insulation criteria currently used for limited partnerships to all ownership forms, including non-voting equity interests. If an interest truly is insulated under those criteria, then it should not be counted; if it is not insulated, then it should be counted so long as it is greater than the general threshold for attribution of ownership interests. Applying this standard will have no meaningful effect on truly passive investors, such as banks and investment partnerships, but it will prevent the networks from evading the intent of ownership limits by exercising undue influence over supposedly independent affiliates.

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<sup>6/</sup> See Economists Incorporated, *An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules*, May 17 1995 at 71.

Similarly, the Commission should discontinue applying the "single majority shareholder" rule absent insulation that confirms the passive nature of the investment. As shown above and in NASA's comments, the networks obtain significant influence when another entity does not insulate its interest and is the majority shareholder in a licensee. *See* Comments of NASA at 10. Again, truly passive interests will not be affected by this change. Other interests, such as those less-than-controlling interests recently acquired by the networks, should be considered in determinations of compliance with the Commission's ownership rules.

Including less-than-controlling interests in ownership calculations would allow the Commission to use an "honest number" that reflects the networks' actual levels of influence. The Commission need not apply this rule retroactively, but only in evaluating the permissibility of interests that networks propose to acquire. In that way, the Commission would permit networks to obtain interests up to the limits it adopts in the ownership proceeding without also allowing the networks to use the attribution rules to avoid the intent of those limits. Absent consideration of less-than-controlling interests, any national ownership cap adopted by the Commission will have no meaningful limit because networks will be able to extend their influence nationwide without a technical violation of the rules. If nothing else, this would be contrary to the intent of the ownership limits as well as the public interest in localism in broadcasting. Whatever may be the "cap" on nationwide ownership of television stations, it is an illusory limit if networks can influence the programming and other decisions of affiliates reaching a nationwide audience that exceeds the cap. If a cap is to have any meaning, it must limit all ownership interests that remain uninsulated and, therefore, can influence the conduct of network affiliated stations.

### III. Conclusion

As networks continue to exploit the exemptions in the Commission's attribution rules, it becomes increasingly important to include all network ownership interests in ownership limit calculations. Indeed, using an "honest number" in network ownership calculations will be particularly important if the Commission modifies the national ownership cap. The networks' existing efforts to use loopholes in the attribution rules to evade the intent of the rules adds urgency to the need to adopt rules that limit the availability of those loopholes.

For these reasons, the Network Affiliated Stations Alliance urges the Commission to adopt rules that are consistent with these reply comments.

Respectfully submitted,

NETWORK AFFILIATED STATIONS  
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**CERTIFICATE OF SERVICE**

I, Tammi A. Foxwell, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 10th day of July, 1995, I caused a copy of the foregoing "REPLY COMMENTS OF THE NETWORK AFFILIATE STATIONS ALLIANCE" to be sent via hand delivery to the following:

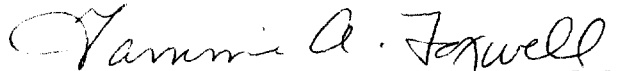
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